

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 11th day of August, two thousand and six.

Present: HON. RICHARD C. WESLEY,
HON. PETER W. HALL,
Circuit Judges,
HON. DAVID G. TRAGER,
*District Judge.*¹

United States of America,

Appellee,

- v -

(No. 04-5149-cr)

Leon Lowe,

Defendant-Appellant.

YUANCHANG LEE, The Legal Aid Society, Federal Defender, New York, New York, *for*

¹ The Honorable David G. Trager of the United States District Court for the Eastern District of New York sitting by designation.

Defendant-Appellant.

THOMAS G. A. BROWN, Assistant United States Attorney (David N. Kelley, United States Attorney for the Southern District of New York, *on the brief*, Peter G. Neiman, *of counsel*), New York, New York, *for Appellee*.

1 Appeal from a judgment of the United States District Court for the Southern District of
2 New York (Holwell, *J.*).

3 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
4 **DECREED** that the judgment of the district court is **AFFIRMED IN PART** and the case is
5 **REMANDED** for resentencing.

6 Appellant Leon Lowe appeals from a judgment of the United States District Court for the
7 Southern District of New York (Howell, *J.*) entered on October 5, 2004. Lowe pleaded guilty to
8 both counts of a two-count indictment charging him with (1) depositing fraudulently negotiated
9 credit card convenience checks in violation of 18 U.S.C. § 1344 and (2) using credit card
10 numbers issued to other persons, without their consent, in violation of 18 U.S.C. § 1029(a)(5).

11 The district court sentenced Lowe principally to 42 months' imprisonment and five years'
12 supervised release and ordered Lowe to make restitution in the amount of \$16,688. Familiarity
13 by the parties is assumed as to the facts, the procedural context, and the specification of issues.

14 First, Lowe challenges the district court's determination of "total loss" under section
15 2B1.1(b)(1) of the Sentencing Guidelines. *See* USSG § 2B1.1(b)(1) (Nov. 2003). We reject
16 Lowe's argument that the district erred in determining total loss under the preponderance
17 standard. "Judicial authority to find facts relevant to sentencing by a preponderance of the
18 evidence survives [*United States v. Booker*, 543 U.S. 220 (2005)]," *United States v. Garcia*, 413

1 F.3d 201, 220 n.15 (2d Cir. 2005), and a district court must apply the preponderance standard
2 even to judicial fact-finding relating to uncharged offense conduct, *see id.* at 222-24 (affirming
3 the sentencing court's application of a preponderance standard in determining uncharged drug
4 quantities and uncharged role determinations); *United States v. Agudelo*, 414 F.3d 345, 349-52
5 (2d Cir. 2005) (affirming the sentencing court's application of a preponderance standard in
6 applying an uncharged obstruction of justice enhancement). Reviewing the district court's
7 findings underlying its loss calculation for clear error, *see Garcia*, 414 F.3d at 222, we find none.

8 Second, Lowe contends that the restitution order violates the Sixth Amendment as
9 construed in *United States v. Booker*, 543 U.S. 220 (2005), because it is based on facts that were
10 neither proved beyond a reasonable doubt to a jury nor admitted by him in his plea allocution.
11 However, we have recently held that judicial fact-finding in connection with a restitution order
12 does not raise the Sixth Amendment concerns identified in *Booker*. *See United States v. Reifler*,
13 446 F.3d 65, 118 (2d Cir. 2006); *see also United States v. Boccagna*, 450 F.3d 107, 108-09 (2d
14 Cir. 2006). Accordingly, we reject as without merit Lowe's constitutional challenge to the
15 restitution order.

16 Finally, we agree that Lowe is entitled to a remand for resentencing under *United States v.*
17 *Fagans*, 406 F.3d 138 (2d Cir.2005).

18 For the reasons set forth above, the district court's judgment is hereby AFFIRMED IN
19 PART and the case is REMANDED to the district court with instructions to vacate the sentence
20 and resentence in conformity with *Booker* and *Fagans*. Any appeal taken from the district court
21 following this remand and resentencing can be initiated only by filing a new notice of appeal. *See*

1 Fed. R. App. P. 3, 4(b).

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For the Court
Roseann B. MacKechnie, Clerk

By: